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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1969. A petition for rehearing was denied on May 15, 1969. The petition for a writ of certiorari was filed on June 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, after an evidentiary hearing, properly ruled that the case against petitioner which had been developed by the F.B.I. was not tainted by the fact that Internal Revenue Service agents

had eavesdropped on a telephone booth when telephone calls were made by another person then under investigation to a telephone number used by petitioner.

2. Whether, in light of testimony of Internal Revenue Service agents that they had not transmitted information obtained by eavesdropping to the F.B.I., the court erred in not requiring the government to produce all reports of the investigation made by an F.B.I. agent who testified at a pretrial hearing that the F.B.I. had not received such information and who described the general nature of his investigation.

3. Whether the court of appeals should have remanded the case to the district court for an evidentiary hearing on petitioner's claim that he was present on premises of another which had been subjected to an electronic surveillance where the government has stated that it had never identified petitioner either as a participant in any conversation monitored or as being present during such a conversation.

4. Whether the trial court properly exercised its discretion under the Jencks statute, 18 U.S.C. 3500, (1) in refusing to strike the testimony of government witnesses on the ground that handwritten interview notes of F.B.I. agents were not produced where the notes had been incorporated into typewritten interview reports that were produced at the trial and (2) in finding that portions of statements of two government witnesses did not relate to the subject matter of their trial testimony.

5. Whether the federal income tax returns of a witness are subject to inspection on demand of a

defendant in a criminal case after the witness testifies on behalf of the government.

6. Whether the court should dismiss the indictment on the ground that it had been returned on the basis of hearsay evidence.

STATEMENT

Petitioner and three others were charged in an indictment returned in the United States District Court for the Southern District of New York with federal gambling offenses in violation of 18 U.S.C. 1084 and 1952 and with conspiracy to commit such offenses. Following a jury trial, petitioner was convicted.[1] On March 22, 1967, he was sentenced to concurrent terms of imprisonment for three years on each of three counts and two years on each of the remaining five counts on which he was convicted.

1. The sufficiency of the evidence is not in dispute. Briefly, it showed that Merrill Garfinkel supplied betting information known as the "line" (the betting odds on particular sporting events) to six or seven customers. Petitioner, one of his customers, paid Garfinkel $50 a week for this service (A. 138–140, 205–206).[2] On a daily basis, from the summer of 1961 until June 1963, Garfinkel telephoned the "line" to petitioner or one of his associates at three succes-

[1] The court acquitted one of the defendants (Nappi) at the close of the government's case. The other two defendants (Restaino and Molinaro) were convicted by the jury but did not appeal.

[2] We are lodging with the Clerk of this Court a copy of the appendix filed by petitioner below. References in the form "A" are to that appendix.

sive telephone numbers in New Jersey (A. 141–142, 148, 152, 160–164, 166–167). Garfinkel also wagered between $50 and $100 a day with petitioner on various sporting events. (See, *e.g.*, A. 145.) On occasion, Garfinkel also placed bets with New York bookmakers for petitioner (A. 149–150, 178–179). Ordinarily petitioner and co-defendant Molinaro paid Garfinkel for supplying the "line" and settled their wagers at different locations in the New York area (see, *e.g.*, A. 149, 153). When Merrill Garfinkel went on vacation for several weeks in the winter of 1962 and 1963, his "line" was disseminated by his brother Howard Garfinkel (A. 150–151, 162–163, 244–249).

Merrill Garfinkel introduced Herbert Seid, a belt salesman, and Vincent Conour, a school teacher, to petitioner's telephone number (A. 154). Initially Seid wagered infrequently with petitioner and settled his wagers through Merrill Garfinkel. Later, after Seid intensified his wagering activities to from $50 to $150 per event, he settled personally with co-defendant Molinaro. On one occasion this was done in the presence of petitioner (A. 284–289). Conour, a statistician who kept extensive records of his wagering activities, began betting with petitioner in April 1962. In May 1962, after Conour had won $5,123, petitioner and Molinaro paid him $123 and asked him to discontinue betting until they could pay him the remaining $5,000 (A. 296–305). Several days later, Molinaro took Conour to an apartment in New Jersey to see petitioner. There petitioner showed Conour the way he operated and introduced him to "Johnnie", the person who

usually took Conour's calls on baseball games (A. 305–308). Subsequently Conour again wagered with petitioner. He won a total of $14,510 by the end of the baseball season (A. 308–310). In the spring of 1963, after Conour made several efforts to collect his winnings, petitioner said "'Teach, don't ever ask me for money again * * * I will have your head bashed in'" (A. 311).

2. One of the telephone numbers that Merrill Garfinkel called when he supplied information or wagered with petitioner was OR 6–1730 (see, *e.g.*, A. 152). This telephone number was assigned to the apartment in New Jersey where Conour had visited petitioner (A. 306). This number had also been called by one Pasquale Borgese, a defendant in another federal wagering case involving transactions unrelated to petitioner's case. Prior to trial petitioner moved to suppress evidence, claiming that the prosecution against him derived from the fact that on September 20, 1962, Internal Revenue Service agents had eavesdropped on Borgese's telephone conversation with the number OR 6–1730 (A. 40–50).

An evidentiary hearing was held. There was no dispute that the agents had eavesdropped upon telephone conversations which Borgese made from a public telephone booth to Orange 6–1730 on September 20, 1962, and one or two occasions thereafter (A. 73). The number which was listed to one John Marsh had been ordered disconnected on November 8, 1962 (A. 110, 549). Jack Wilson, the Internal Revenue Service agent in charge of the Borgese investigation, testified

that neither he nor anyone else in the Internal Revenue Service had furnished any information with respect to the telephone number Orange 6–1730 to anyone in the FBI (A. 106).

Paul Neumann, an F.B.I. agent, testified that in January, 1963, he was assigned to investigate the use of fictitious telephone cards and to try to identify the individuals using such cards. In May, 1963, the F.B.I. received an anonymous letter identifying Merrill Garfinkel as the user of a fictitious card (A. 75–76). After conducting a surveillance of Garfinkel, Neumann interviewed him in June, 1963, and thereafter interviewed bettors. Among the persons identified after the interview with Garfinkel was petitioner (A. 76). Neumann testified that he had never conversed with the Internal Revenue Service about telephone number OR 6–1730 or petitioner's case (A. 76–77).[3] Neumann said the number OR 6–1730 was in the records of calls made on a fictitious credit card when he first got the case in January, 1963, but it did not mean anything to him at the time (A. 81, 87). On September 19, 1962, the F.B.I. had received information that the Orange number had been called on September 9, 1962, by a person using a fictitious credit card (A. 113). The court directed the government to produce the letter written by Mr. Beasley, Neumann's predecessor, requesting a credit check on John Marsh, the listed subscriber to this number (A. 114–115, 126–129).

[3] At this point direct examination ended. Petitioner sought all reports dealing with the agent's testimony on direct. The government objected that this would reveal the government's whole case. The court declined to order the reports produced (A. 77–81).

The court denied the motion to suppress. It found that the F.B.I. had developed the case without knowledge or use of any evidence obtained by the Internal Revenue Service in the Borgese case (including the fact that Borgese used or called Orange 6–1730). The court found it unnecessary to decide whether electronics eavesdropping of the telephone booth used by Borgese was a violation of his constitutional rights or an invasion of a constitutionally protected area (A. 412–413).

ARGUMENT

1. Since the district court found that the evidence against petitioner was obtained by the F.B.I. from sources wholly independent of the Internal Revenue Service, the court found it unnecessary to decide the legality of the eavesdropping at the time it was conducted or petitioner's standing. This case, therefore, does not present the question "whether a person whose telephone number is called has standing to suppress the fruits of an eavesdrop that overhears only the caller's end of the conversation" (Pet. 29). Assuming arguendo both illegality and standing, the evidence at the hearing established that there was no basis for reversal of petitioner's conviction. The record is clear that the Orange number was one of those known to the F.B.I. as having been called through use of a fictitious card before September 20, 1962, when the Internal Revenue Service agents first heard Borgese call the number. The Orange number had no real significance to the F.B.I. until after they interviewed Garfinkel in May, 1963, and obtained petitioner's name and the names of the bettors. The district court prop-

erly found that the case against petitioner did not develop and was in no way the result of the eavesdropping on Borgese.

2. With respect to the question whether reports by an agent who testifies on a motion to suppress must be turned over under 18 U.S.C. 3500, the issue presented by this case is far narrower than petitioner suggests. The district court did not refuse to have the agent produce records having a direct bearing on the suppression issue, *i.e.*, the knowledge and use of the Orange number. The district judge required the government to turn over to the defense the records relating to that number, the request for investigation in September, 1962, and the anonymous letter of May, 1963. Moreover, during the testimony of an internal revenue agent on the motion to suppress, the government turned over to petitioner its records of the overheard conversation and other records made by the Internal Revenue Service agents during their investigation of Borgese (A. 98–101, 106–107).[4] All that the district court denied was the defendants' request for the production of the reports of F.B.I. agent Neumann after he testified on direct that he interviewed

[4] Petitioner's attorneys here were the same attorneys that had represented Borgese. In the *Borgese* case, all government agents involved in the surveillance of the public telephone booth, testified and the court permitted cross-examination with material ordered turned over to the defense under the Jencks Statute, 18 U.S.C. 3500. See *United States* v. *Borgese*, 235 F. Supp. 286 (S.D.N.Y.), reversed on other grounds, 372 F. 2d 950 (C.A. 2).

Garfinkel and numerous other people after receipt of the anonymous letter of May, 1963.[5]

The court below properly held that the Jencks Act does not apply automatically on a motion to suppress, and that the matter of production on such a motion rests in the discretion of the court hearing the motion. The practice followed in hearings before trial on suppression motions under Rule 41 F.R. Cr. P., like other motion practice, has never been equivalent to the practice followed in the trial on the merits. Affidavits, for example, may sometimes be used. See *Baker* v. *United States,* 401 F. 2d 958, 979–980 (C.A.D.C.). This Court itself has long recognized that the issues presented in a suppression inquiry may be handled differently because they are collateral to the trial. Thus, in *Nardone* v. *United States,* 308 U.S. 338, 341, this Court held that a suppression proceeding may be a "closely confined" inquiry. More recently, in *Alderman* v. *United States,* 394 U.S. 165, 185, while holding that the defense was entitled to examine records of illegally overheard conversations, this Court said:

> None of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to

[5] Some of his reports relating to statements of Merrill Garfinkel were turned over at the trial.

nothing else. Whether this is the case or not must be left to the informed discretion, good sense and fairness of the trial judge. See *Nardone* v. *United States,* 300 U.S. 338, 341–342 (1939).

Cf. *Harris* v. *Nelson,* 394 U.S. 286.

Neither the language nor history of the Jencks Act indicates that Congress intended conformity between motion practice and the trial on the merits. The statute in specific terms provides that no statement shall be the subject of discovery until after a government witness has testified on direct examination "in the trial of the case." And, as the court below pointed out, suppression hearings were not alluded to in the legislative history. This case illustrates why the question of production on a motion to suppress should be left in the realm of discretion. There was no reason here to allow petitioner to review the reports of all the interviews conducted by agent Neumann after May, 1963, even though on direct the agent described generally the nature of his investigation. On the other hand, as to the Orange number, which was at the core of the motion to suppress, the court could and did make certain that petitioner was given all relevant documents.

3. In the court of appeals, petitioner requested that the government reveal whether there had been any electronic surveillance or wiretapping of him by any government agency.[6] The United States Attorney, at

[6] A similar motion had been denied in the district court (A. 269).

the request of the court of appeals, advised that the Department of Justice had no information indicating that conversations of petitioner "were at any time overheard by unlawful electric surveillance" (Pet. App. 22a). After the government revealed in the case of *United States* v. *DeCavalcante,* Criminal No. 111–68 (D.N.J.), decided April 16, 1968, that conversations of DeCavalcante had been monitored at DeCavalcante's place of business and at a particular location in Mountainside, New Jersey, petitioner stated he was on the two premises during the periods in which the monitoring occurred. The government, in response, stated that a review of its records revealed that petitioner had not been a subject of direct microphone surveillance nor were any of his conversations monitored by any electronic device. It also stated that the two locations mentioned had been taken into consideration and that petitioner "could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations" (Pet. App. 23a).

The court of appeals correctly held that further adversary proceedings in the district court were not required to determine if the government's case against petitioner was tainted. As pointed out above, the district court, after hearing evidence that the case developed from the government's investigation of Merrill Garfinkel, had previously concluded that the case was not tainted. When petitioner on appeal alleged that he was present in two premises in which the government had admitted monitoring conversations of DeCavalcante, the government unequivocally denied

that it had overheard petitioner. As this court said in *Taglianetti* v. *United States*, 394 U.S. 316, 317:

> Nothing in *Alderman* v. *United States*, *Ivanov* v. *United States*, or *Butenko* v. *United States*, *ante*, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. * * *

4. The trial court did not err in its ruling at the trial on petitioner's motions under the Jencks Act:

(a) On the termination of direct examination the government furnished statements of the witnesses pursuant to defense requests under the Jencks Statute, 18 U.S.C. 3500. The statements were each prepared by the F.B.I. agents who interviewed the witness and were in typewritten form. After the defense requested the original handwritten notes of the agents from which the reports were made, the court permitted the prosecution and the defense to question the F.B.I. agents who prepared the reports. The agents testified that, following their normal practice, they transcribed their handwritten notes into a typewritten report within five days of each interview, that the typewritten report incorporated the statements contained in the original notes and that as soon as the original report was proofread, the handwritten notes were destroyed (A. 223, 230–231, 358–359). After hearing testimony, the trial judge denied a request to strike the testimony of the various government witnesses on the ground that the handwritten interview notes of the F.B.I. agents should have been preserved for production at the trial (A. 413). There is no reason to believe that the handwritten notes would have been more

useful than the typewritten reports which were given the defense counsel. As the Court said in *United States* v. *Comulada,* 340 F. 2d 449, 451 (C.A. 2), certiorari denied, 380 U.S. 978:

> There is nothing in 18 U.S.C. § 3500 which requires that all memoranda made in the course of an investigation should be kept and preserved * * *. Indeed, every consideration of efficiency and economy would seem to require the destruction of such fragmentary memoranda as soon as they are no longer needed.

See also *United States* v. *Williams,* 384 F. 2d 488, 493 (C.A. 2), certiorari denied, 385 U.S. 836; *United States* v. *Jones,* 360 F. 2d 92, 95 (C.A. 2), certiorari denied, 385 U.S. 1012.

(b) When the defense requested Jencks Act statements of witnesses Merrill and Howard Garfinkel, the government turned over certain statements and submitted other statements to the court. After an *in camera* inspection the trial court turned over an additional portion of one statement to the defense and ordered the balance of the statements sealed on the ground they did not relate to the direct examination (A. 199, 202–203, 253–255). In all, petitioner received all or part of 12 of 17 statements made by the Garfinkels. The court below, after examining the material, described it as statements of the witnesses relating to the Garfinkels' knowledge of the gambling activities of persons other than the defendants (Pet. App. 17a).

Petitioner argues (Pet. 23–24) that, since the court of appeals said that the materials might have been employed by defense counsel to show that the Garfinkels were in the business of bookmaking, it was error to

deny him the sealed exhibits because he could have used such exhibits to demonstrate that Merrill Garfinkel was the bookmaker and petitioner was the customer when the two wagered. But the fact that the Garfinkels had knowledge of the gambling activities of persons other than the defendants was no secret at the trial. Indeed, the Garfinkels were admittedly in the related business of supplying a betting line to bookmakers. Merrill Garfinkel also testified both on direct and cross-examination that he frequently placed bets with New York bookmakers on petitioner's behalf. Indeed Merrill Garfinkel admitted that in such situations, petitioner was the customer and the other party was the bookmaker. Moreover, Garfinkel introduced Herbert Seid and Vincent Conour to petitioner as bettors and at times Seid settled his bets through Garfinkel. In these circumstances it was not error for the trial court to refuse to order disclosure of the Garfinkels' statements about the gambling activities of others. See *Palermo* v. *United States,* 360 U.S. 343, 353.

The decision below does not conflict with *Ogden* v. *United States,* 303 F. 2d 724, 740 (C.A. 9), where the court described the test for production of statements as "whether the omitted portions of the statement 'may be material to the preparation' of proper cross-examination." When the court below said (Pet. App. 17a) that "the information the trial judge withheld was not sufficiently relative to the subject matters the witnesses had testified about to fall within limits of demandable material Congress had carefully delineated in 18 U.S.C.

§ 3500," it was in effect saying that the statements were not material to proper cross-examination.

(c) Petitioner was not entitled to examine as of right the federal income tax returns of the government's witnesses as a "statement" made to "an agent of the Government." At the time Congress enacted the Jencks Statute in 1957, the confidentiality of income tax returns was established by a statute providing that it was unlawful to disclose their contents except as provided by law. 26 U.S.C. 7213. The purpose of the Jencks statute was to guard against needless disclosure of confidential statements made to investigating agents while at the same time assuring a criminal defendant access to pertinent material permitting him to cross-examine government witnesses. Nowhere in the legislative history is there any suggestion Congress intended that a tax return be considered to be a statement made to an agent of the Government within the meaning of the statute. See H. Rep. No. 700, 85th Cong., 1st Sess.; S. Rep. No. 981, 85th Cong., 1st Sess. There is therefore no basis for construing Section 3500 in a manner which would undermine the confidentiality which attaches to income tax returns.

5. There is no reason in this case to reconsider this Court's ruling in *Costello* v. *United States*, 350 U.S. 359, that an indictment returned by a properly constituted grand jury is not subject to attack on the ground that it rests on hearsay evidence. This case was presented both to the grand jury that returned the original indictment and the grand jury that re-

turned the superseding indictment before the decision of the Second Circuit in *United States* v. *Umans,* 368 F. 2d 725, 730, certiorari dismissed as improvidently granted, 389 U.S. 80. In *Umans,* the court of appeals, while declining to dismiss the indictment, indicated that excessive use of hearsay would tend to undermine the function of the grand jury and suggested that hearsay evidence be used only when direct testimony was unavailable or when it was demonstrably inconvenient to summon witnesses with personal knowledge. Since *Umans* the United States Attorney for the Southern District of New York has instructed his assistants to submit to the grand jury firsthand testimony of actual witnesses except where serious practical difficulties or obstacles make this impracticable. There is, therefore, no reason to suppose that hearsay evidence is being used by that office to circumvent the production of grand jury testimony under the ruling of *Dennis* v. *United States,* 384 U.S. 855.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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